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No. 07-1328

IN THE

Supreme Court of the United States

ROSA ACUNA, INDIVIDUALLY,

Petitioner,

v.

SHELDON C. TURKISH, M.D., AND THE OBSTETRICAL AND GYNECOLOGICAL GROUP OF PERTH AMBOY-EDISON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF

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ARGUMENT

In their Brief in Opposition, Respondents present two arguments against certiorari. First, they argue this Court does not have jurisdiction because the decision below was based solely on state law. Second, they argue the federal issues presented do not deserve the attention of this Court. Neither has merit. Rather, they are based on misstatements of the opinion below and the record below, misunderstandings of the opinions of this Court and other legal authority, and mischaracterizations of Petitioner's positions.

Before addressing the flaws in Respondents' specific arguments, it is appropriate to address the contention central to both arguments: that the opinion below is based solely on state law.

A. The decision below was not based exclusively on state common law. Rather, it is based on an incorrect interpretation of this Court's opinions in *Roe* and *Casey*. Thus, on its face the decision below raises constitutional issues.

Respondents ground their arguments on the assertion that the decision below was based solely on the state common law controlling informed consent claims. While it is clear that Petitioner's Complaint only presents informed consent causes of action, it must be kept in mind that the claims arise from performance of an abortion. As this Court is well aware, abortion is the one aspect of medical practice where issues almost inevitably implicate federal constitutional law, given this Court's rulings in *Roe v. Wade*, 410 U.S. 113 (1973), and

Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992), and progeny. This case is no different.

Petitioner contends that in seeking Mrs. Acuna's consent to the abortion, Dr. Turkish should have informed her that the procedure he proposed — an abortion — would terminate the life of a human being, as a matter of biological fact. Petitioner has been consistently clear that she did not want Dr. Turkish to discuss philosophical or moral perspectives. Rather, what Petitioner has consistently contended is that Dr. Turkish should have provided a statement from scientific and medical perspectives, the disciplines in which a physician is trained and qualified to speak. If he had given the disclosures while stating he was only speaking medically or scientifically, Mrs. Acuna would not have given her consent to the abortion, and this litigation would have been avoided.

Instead of providing Mrs. Acuna with accurate scientific information, Dr. Turkish told Mrs. Acuna, when she asked if her "baby is already there," that it was nothing but "some blood" or "some tissue." By doing so, he misrepresented the facts, and expressed his own ideology, in the guise of scientific fact.

Petitioner contends that Dr. Turkish should have provided Mrs. Acuna with accurate scientific and medical information so that she could apply her own personal philosophical and moral values to the decision of how to proceed. Then, and only then, could she make the kind of informed decision that the informed consent doctrine is designed to ensure — the kind of informed consent decision that this Court has recognized is critical in the

abortion context. *Gonzales v. Carhart*, __ U.S. __, 127 S.Ct. 1610, 1634 (2007) ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the fact, what she once did not know"); *Casey*, *supra*, 505 U.S. at 882 (recognizing that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision'" and that there is a "risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed").

Dr. Turkish failed to provide Petitioner with the information she needed to make an informed decision, and so she was misled into submitting to the abortion. Subsequently she became aware of the information she sought from Dr. Turkish, and once she did she experienced precisely the anguished grief, profound sorrow, and devastating psychological consequences that this Court recognized could occur.

In the decision below, the New Jersey Supreme Court rejected Petitioner's contentions. *Acuna v. Turkish*, 930 A.2d 416, 425-428 (N.J. 2008). But contrary to Respondents' assertions, the court below did not rule based on state common law. As the Petition explains in detail, if the court below had applied its well-established principles of common law, principles which the court below recognized were applicable, it would have held that Petitioner was entitled to a jury trial on these claims.

Instead, the court below entered summary judgment, based solely on its conclusion that it would

be a statement of ideology to refer to the unborn child as a "human being," regardless of perspective. *Id.*; see also Brief in Opposition, at 22 (acknowledging that this was the basis of the decision below). This conclusion in turn was based primarily on this Court's statements in *Roe* and *Casey*. See Petition, at 24-26; Petitioner's Supplemental Brief, at 6-8.

The primary constitutional issue, then, is whether *Roe* and *Casey* mandate the conclusion that it is a statement of ideology to state that as biological fact the unborn child is a living human being. As discussed at length in Petitioner's Supplemental Brief, at least two groups of judges have concluded that *Roe* and *Casey* do so mandate — the justices of the New Jersey Supreme Court in *Acuna* and the four dissenters in *Planned Parenthood Minnesota v. Rounds*, 530 F.3d 724, 738 (8th Cir. 2008) (*en banc*). These judges focus in particular on the statement in *Roe*, 410 U.S. at 159,

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

The conclusion of the court below — like that of the dissenters in *Rounds en banc* — is based on a misunderstanding of this Court's opinions in *Roe* and *Casey*. Nothing in *Roe* or *Casey* would suggest that this Court intended to preclude speaking scientifically of the

unborn child as a member of species of human beings. Yet that is exactly what the court below understood this Court to say. This misunderstanding can only be corrected by this Court. Until this Court does, confusion will persist.

Respondents assert that this misunderstanding is exactly what was intended by this Court. They highlight the discussion in *Roe* of whether the unborn child is a "person," Brief in Opposition, at 16 n.1, suggesting that the word "person" and the term "human being" are interchangeable, even though the very point the *Roe* Court was making is that the two are not identical. Likewise, Respondents suggest that *Roe* means the question of whether an unborn child is a human being scientifically can never be isolated from the metaphysical questions. *Id.* There is absolutely no basis, whether in the opinions of this Court or in logic or fact, for that suggestion. As the majority in *Rounds* recognized, a physician can easily deal with the question from the scientific/medical perspective without becoming involved in discussing ideology. *Rounds en banc*, 530 F.3d at 735-736.

Respondents even attempt to argue that the *en banc* decision in *Rounds*, 530 F.3d at 724, supports their position. Brief in Opposition, at 19-21. They do so by emphasizing that the majority relied upon the statutory definition, and by noting that there is no equivalent statutory definition in this case. The absence of a statute in this case is simply irrelevant. As was noted above, Petitioner's position has consistently been that Dr. Turkish should have provided a disclosure tailored to the realms in which he is trained, science and

medicine. This achieves the same effect as the *Rounds* court recognized was achieved by the statutory definition.

In sum, the decision below was not based solely on state common law, but on an understanding of this Court's opinions in *Roe* and *Casey*, an understanding that is incorrect.

B. Additional federal constitutional law issues are presented in this matter. By its decision, the court below deprived Petitioner of her Fourteenth Amendment rights to due process and equal protection. The failure of the court below to address these issues is irrelevant. What is relevant is that the issues were raised below.

Even if the decision below had been based solely on state common law, which it is not, the Petition presents questions as to whether the New Jersey Supreme Court — by deciding as it did — violated Petitioner's Fourteenth Amendment rights to due process and equal protection.

As developed at length in the Petition, at 27-34, Petitioner contends that by failing to follow its established procedures, and by failing to follow well-settled state law, the decision of the court below was a denial of due process and equal protection. Specifically, Petitioner was denied procedural due process when the court below failed to apply its normal standards for summary judgment motions. The court below resolved what even it characterized as a dispute between experts, instead of leaving the question to be resolved by the

jury; this is particularly offensive since there were significant issues with regard to the admissibility of Respondents' experts. Likewise, Petitioner was denied equal protection when the court below failed to apply two well-settled principles of informed consent law: the principle that recognizes that where a procedure will impact a second patient a physician has a duty to discuss that impact with both patients (or the patients' representatives); and the principle that when a patient asks a physician a question the physician cannot respond falsely or misleadingly.

It is apparent from their arguments that Respondents do not comprehend these contentions. Instead, they focus on the constitutional arguments that Petitioner raised relative to others claims presented in the Complaint, claims that simply are not involved in this stage of the litigation. See Brief in Opposition, at 8; see also *id.*, at 16-18.

C. This Court has jurisdiction over the matter. Respondents arguments to the contrary are meritless, both relative to the law governing this Court's jurisdiction and relative to the facts.

Respondents contend that this Court does not have jurisdiction over this matter, making both a procedural and a substantive argument. Neither has merit.

Respondents' procedural argument asserts that Petitioner failed to properly establish this Court's jurisdiction, stating that the only place the Petition presented "argument" as to jurisdiction was in the Statement of Jurisdiction, even claiming that the

Petition fails to comply with Rule 14.1(g)(i). Brief in Opposition, at 7-8. All Respondents have done is demonstrate their misunderstanding of this Court's Rules. The Statement of Jurisdiction is addressed in a different part of the Rule, Rule 14.1(e), and the Petition fully complies with its requirements. The Rule cited by Respondents addresses the Statement of the Case, and Petitioner's Statement of the Case, Petition, at 3-5, does comply fully with the quoted requirements. It spells out the procedural history of the case, identifying the stages below when the federal issues were raised, even providing citations to the pages in the record. Respondents' procedural argument is utterly without merit.

Respondents' substantive argument is equally flawed. It is based on the premise that the opinion below was based solely on state common law. As discussed above, this premise is simply wrong. Rather, the court below based its decision on its understanding of *Roe* and *Casey*.

In this regard, it is important to note that the New Jersey Supreme Court never stated in any way, much less plainly, that its references to *Roe* and *Casey* were being used solely as guidance, and that these decisions did not compel the result reached. *Cf. Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Indeed, its discussion of the original panel decision in *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716 (8th Cir. 2006), *rev'd en banc*, 530 F.3d 724 (8th Cir. 2008), *see Acuna*, 930 A.2d at 427, indicate the opposite. In that opinion, the panel court held very clearly that its result was compelled by *Roe* and *Casey*. When the New Jersey Supreme Court

has intended to signal that it is making a decision on independent state grounds, it will expressly so state. *See, e.g., State v. Branch*, 865 A.2d 673, 682 (N.J. 2005); *State v. Fuller*, 862 A.2d 1130, 1141 (N.J. 2004). The failure to do so in this case compels a conclusion that the federal cases were critical to the decision of the court below.

Even if it were not clear from the decision below on its face that the matter presents federal constitutional issues, this Court would still have jurisdiction, because the decision below deprived Petitioner of due process and equal protection.

With regard to these bases for jurisdiction, Respondents argue that there is no jurisdiction because the issues were not addressed by the court below. In their attempt to show that the issues were not addressed, Respondents quote from the decision below, " We need not reach the constitutional arguments. . . ." Brief in Opposition, at 8, quoting *Acuna*, 930 A.2d at 427. What Respondents fail to note, but what puts the quotation in a completely different light, is the language of the decision below that Respondents replaced with an ellipsis. That language makes it clear that the constitutional arguments the court was not addressing were the "arguments raised by defendants and *amici* who claim that it is an undue burden on a woman's right to self-determination and a violation of a physician's First Amendment free speech right. *Id.* Why Respondents chose to misrepresent the decision below in this fashion is not clear, but what is clear is that the court below was not even referring to Petitioner's constitutional issues.

Ultimately, the failure of the court below to address Petitioner's arguments does not matter in determining this Court's jurisdiction. Respondents are wrong when they argue that the standard that governs jurisdiction mandates that the federal issue be **both** raised below **and** addressed below. Brief in Opposition, at 9. Rather,

> The apparent rule of *Crowell v. Randell*, [35 U.S. 368, 392 (1836)], that a federal claim have been both raised and addressed in state court was generally not understood in the literal fashion in which it was phrased. See R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 60 (1951). Instead, the Court developed the rule that a claim would not be considered here unless it had been either raised or squarely considered and resolved in state court.

Illinois v. Gates, 462 U.S. 213, 218 n. 1 (1983); *see also People ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (" Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.").

Petitioner repeatedly throughout this litigation raised the due process and equal protection arguments presented in the Petition. See Petition, at 3-5. While the court below did not explicitly address them, it implicitly rejected the arguments by its ruling. Indeed, it was that very ruling that violated Petitioner's rights. This is more than sufficient to provide this Court with jurisdiction.

D. The constitutional issues raised are substantial, and worthy of this court's consideration. Respondents' arguments to the contrary are without merit.

Respondents argue in their Brief in Opposition, at 14-24, that the constitutional issues are not substantial. But all these arguments demonstrate is that Respondents have failed to understand the constitutional issues involved in the matter.

Respondents continue to confuse the constitutional arguments that Petitioner made with regard to the wrongful death claim (arguments that were addressed in a completely separate Petition) with the due process and equal protection arguments made here. This is particularly evident in Respondents' discussion of *Alexander v. Whitman*, 114 F.3d 1392 (3rd Cir.), *cert. denied*, 522 U.S. 949 (1997), and *Marie v. McGreevey*, 314 F.3d 136 (3rd Cir. 2002), *cert. denied*, 539 U.S. 910 (2003)[1]. Brief in Opposition, at 16-17. Those two cases dealt primarily with the wrongful death claims, and whether the failure to recognize a cause of action for the wrongful death of an unborn child was unconstitutional. Indeed, they are relevant to this matter insofar as *Alexander* (and by implication *Marie*,

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[1] Respondents look to make much of the fact that Petitioner did not cite to *Marie* in the Petition. Brief in Opposition, at 17-18. However, this case was not cited for a simple reason — there was nothing relevant in its language with regard to the issues presented here.

which relied on *Alexander*) accepted that the question of whether the unborn child is a human being scientifically is a question of fact, a position that the court below rejected.

Respondents persist in asserting that Petitioner wants is to "mislead women as to the true nature of the abortion procedure," Brief in Opposition, at 21, by seeking "to communicate a viewpoint laden with philosophical, religious and moral judgment: that every abortion is tantamount to murder," *id.* at 22. Nothing could be further from the truth. What Petitioner seeks is just the opposite. She seeks redress from Dr. Turkish, who gave her "information" that was false and misleading, instead of providing her with accurate scientific information as he should have done. By telling Mrs. Acuna that all there was was just "some blood or "some tissue," he communicated his own value judgements and ideology, presenting it as scientific fact. The court below refused to recognize the validity of her claim, based on its understanding of *Roe* and *Casey*, an understanding that is wrong. Only this Court can correct that error.

CONCLUSION

It is clear that Respondents' arguments against the granting of Certiorari are without merit. This Court must grant the Petition for Certiorari and address the important questions raised in the Petition.

Respectfully submitted,

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